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The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union

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A. Introduction: Crises *in* and *of* Europe

"We seem to be caught in an 'impossible interregnum': After the end of classical national sovereignty, before the beginning of a postnational sovereignty."[1]

There is a growing sense of crisis *in* and *of* the European Union. Crises in Europe range from the immediate economic crisis of the Eurozone to political and cultural crises associated with the rise of right-wing populism and reaction to the perceived failure of state multi-culturalism.[2] Neither economic nor cultural woes in Europe are restricted to the Eurozone or even to the European Union; they are frequently perceived as elements of broader global crises of democratic capitalism. And yet, however intimately intertwined with domestic and international crises, there is also a specific sense of crisis of the European Union, such that its very survival is perceived to be at stake— unlike its Member States or the international order of states. Because the existential crisis of the EU is not disconnected from the simmering elsewhere, it is important to keep in view both sets of crises, in and of the European Union, in assessing the Union's current predicament and future trajectory.

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[1] ETIENNE BALIBAR, WE, THE PEOPLE OF EUROPE: REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 161 (James Swenson trans., 2004). It echoes Gramsci's: "The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear." ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 556 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).

[2] The two—economic and political crises—are of course often inter-related, creating the perfect storm, as in Greece with the rise of the Golden Dawn party. But political and constitutional concern for right-wing extremism is hardly unprecedented, even in the EU, and certainly predates the current economic crisis, most evidently in the *Austrian affair* when concern for the internal situation of a Member State, specifically the entry into government of the rightwing Austrian Freedom Party, led to the imposition of diplomatic sanctions against Austria in 2000.

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The existential threat to the EU is presented here in constitutional terms, with crisis heralding a reconstitution of Europe's political form.[3] If crisis occurs when the organizational principles of a society are forced to change because they no longer permit "the resolution of problems that are critical for its continued existence,"[4] we can speculate on the kind of constitution that will emerge as the organizational principles of the EU appear no longer fit for purpose. What, in other words, might post-national sovereignty in Europe look like from a constitutional perspective? Why, in particular, does democracy seem to be under such sustained threat in current conditions?

In order to help answer these questions, this article will turn to the recent work of Wolfgang Streeck. Streeck conceptualizes the current predicament through the lens of critical political economy, as a crisis of democratic capitalism.[5] Stated briefly, crisis emerges from a deep-seated tension, or *dynamic disequilibrium*, between the imperatives of capital, which subject politics to the pressures of the financial markets, and those of democracy, which subject politics, ideally, to the demands of the people. Using that framework, this article speculates on the EU's constitutional trajectory, the reconfiguration of political and legal power that will be produced by the struggle between democracy and capitalism, people and markets. In the post-national constellation the antagonism is characterized by an acute and increasing imbalance in favor of the interests of capital over those of democracy, an imbalance which presages a new political form in Europe: *Authoritarian liberalism.*

The specter of authoritarian liberalism is outlined here only with broad brushstrokes. These highlight the dominance of the economic over the political and legal constitution in the various formal and informal responses to the crisis. Integration through law and politics is replaced by integration through fear, and the "whip of necessity" and a disarmingly cavalier attitude towards normative principles is displayed. Integration proceeds and legal and political norms are ignored or suspended for the sake of preserving financial stability, economic unity and market liberalism, rather than for the sake of preserving social cohesion, security or political unity. The practice of authoritarian liberalism is to conceal, rather than to confront, the conflict between democracy and capitalism, and it utilizes a powerful motto of depoliticization, "there is no alternative."

Authoritarian liberalism is not entirely novel or unique to the EU. Its lineages can be traced in ordo-liberal and neo-liberal traditions that foreshadow the rise of the twentieth century

[3] For a more detailed theoretical account of this approach to constitutionalism, see Michael Wilkinson, *Political Constitutionalism and the European Union*, 2 MOD. L. REV. 191 (2013).

[4] *See* Thomas McCarthy, *Legitimation Problems in Advanced Capitalism*, *in* LEGITIMACY AND THE STATE 156, 159 (William Connolly ed., 1984) (paraphrasing Jürgen Habermas).

[5] *See generally* Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5 (2011); *see also* Wolfgang Streeck, *Markets and Peoples*, 73 NEW LEFT REV. 63, 70 (2012).

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market state. Nor is it an inevitable outcome of the constitutional transformation of Europe. The EU does, however, raise quite specific concerns of a democratic nature. These are presented here in order to signpost more clearly a path that otherwise might be blindly taken or inadvertently stumbled upon. It must suffice at this stage to highlight the contingency of Europe's transformation. *Crisis* also opens a space for *critique*; it lays bare the precariousness of the existing order and the tensions and contradictions on which it rests. It suggests, in other words, the possibility of alternatives.

B. A Constitutional Crisis?

Because of the acute nature of the economic crisis in the Eurozone, it is easy to forget that from a constitutional perspective, the EU has been in a critical limbo since the failure of the Constitutional Treaty, rejected in referenda by the peoples of France and the Netherlands and subsequently abandoned in favor of the Lisbon Treaty. The sense of academic and elite dismay wrought by this debacle and the identity crisis it precipitated now appears something of a luxury, an indulgence befitting calmer times. It is not the place here to pursue, counterfactually, whether a constitutionalized Europe would better have weathered the economic and political storm or at least navigated a smoother path around it.[6] It could well be that—whether ersatz or genuinely constitutional—the EU constitutional project came *too early*, when few saw its real need or purpose and therefore dismissed it as an exercise in political hubris and elite mismanagement.[7] But far from failure providing a salutary caution to political elites in their pursuit of a project that was increasingly alienating its citizenry, the major reforms signaled by the Constitutional Treaty were transplanted, with some cosmetic adjustments and symbolic attachments jettisoned, to the Lisbon Treaty, circumventing the need for popular approval.[8]

Europe now is in desperate need of the kind of solidarity-generating momentum that a constitutional process might engender in its public. But, it seems, that ship has already sailed.[9]

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[6] For many, the Constitutional Treaty itself, although it came to be known as the European constitution, was merely a Treaty "masquerading" as a constitution. *See e.g.*, Joseph Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3 INT'L J. CONST. L. 173, 173 (2005). For an exploration of what was missing from the Constitutional Treaty and absent from the subsequent Reform Treaty, see Alexander Somek, *Postconstitutional Treaty*, 8 GERMAN L.J. 1121, 1125 (2007).

[7] The rationale given for the Constitutional Treaty was usually functional; it contained reforms necessary for enlargement and for simplification of the Treaties. It was presented to its citizens as a *fait accompli*. For this reason, its rejection was interpreted by one commentator as "the birth of the European citizen." Herman van Gunsteren, *The Birth of the European Citizen Out of the Dutch No Vote*, 1 EUR. J. CONST. L. 406, 406 (2005). Somek considered this rejection as evidence that "democracy was not yet dead in Europe." Somek, *supra* note 6, at 1123.

[8] With the exception of Ireland, which required a referendum for its own constitutional reasons.

[9] For a compelling argument for its return, see Neil Walker, *The Place of European Law*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 57 (Joseph Weiler & Grainne De Burca eds., 2011).

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"Constitution-making has hitherto been a response to situations of crisis," noted Jürgen Habermas in a celebrated essay penned in 2001 that signaled the prelude to the ill-fated constitutional experiment in Europe. But "where is such a challenge . . . in today's rather wealthy and peaceful societies of Western Europe?" he asked, with what now seems exquisite irony, merely a decade ago and yet otherwise so distant in tone.[10]

At the dawn of the new millennium, Europe was characterized as a "paragon of international virtues,"[11] the European dream as a "beacon of light"[12] and a "model for the nations of the world."[13] We were at the threshold of the "New European Century."[14] The European Union had, we were told, attained a "stable constitutional equilibrium"; its democratic deficit and neo-liberal bias were entirely justifiable.[15] Even those less supine voices were eager to celebrate its unique achievements as a *sui generic* non- or post-state polity, pursuing its chosen *Sonderweg* despite all the obvious obstacles.

A decade is, perhaps, a long time in modern constitutional politics. It is still, nonetheless, remarkable to consider quite how quickly and dramatically evaluations of the European Union have been downgraded in the long decade that begins the twenty-first century.

Euphoria and triumphalism are now replaced with a deafening silence from some quarters and a carry-on-regardless sense of complacence or willful neglect of the scale of Europe's problems from others.[16] Grim pessimism is increasingly prevalent among those who were

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[10] Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 8 (2001).

[11] PERRY ANDERSON, NEW OLD WORLD 47 (2009) (quoting TONY JUDT, POSTWAR: A HISTORY OF EUROPE SINCE 1945, at 799 (2005)).

[12] *Id*. at 48 (quoting JEREMY RIFKIN, THE EUROPEAN DREAM: HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM 382 (2004)).

[13] *Id*. at 48-9 (quoting Marcel Gauchet, *Le problème européen*, 129 LE DÈBAT 50, 66 (2004)).

[14] *Id*. at 47-8 (quoting MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY 4 (2005)). Anderson characterizes these images of Europe as illustrating illimitable narcissism rather than merely self-satisfaction.

[15] Andrew Moravscik, *In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MARKET STUD. 603, 618 (2002); Andrew Moravscik, *The European Constitutional Compromise and the Neo-functionalist Legacy*, 12 J. EUR. PUB. POL. 349, 366 (2005). European issues, Moravscik argued, were not that important to voters, being in their nature of minimal political and economic salience.

[16] Armin von Bogdandy begins a recent article with the remarkably understated, "Europe is not a democratic showcase," but goes on to argue that democracy beyond the state does not substitute but complements domestic forms. Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations*, 24 EUR. J. INT'L L. 322, 323 (2012). Any other conclusion would be "useless" for legal doctrine because it would be unable to give meaning to a term of positive law, the "democracy" of Article 2 TEU. *Id*. at 323. The European Union can provide a model for the democratization of the international arena we are informed, without a trace of irony.

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always more passionate about Europe than about the EU, Europe's present conjuncture heralding the "end of the West."[17] Unless it finds the capacity to start again "on radically new bases," Etienne Balibar laments, "Europe is a dead political project." [18]

Even on a more sober assessment, there is "grave crisis" in Europe, the EU reaching a "nadir which one cannot remember for many decades."[19] Joseph Weiler specifically identifies an abrupt transformation of mentality in Europe, from "integration through law" to "integration through fear," using the threat of catastrophe precipitated by the potential collapse of the Euro to push through institutional reforms. This, tragically, threatens to undo one of its greatest achievements: Having made European integration into "something that Europe is" as opposed merely to "something that Europe does."[20] That existential sense of European unity is now in danger of being lost. And, turning merely to what Europe does, the suspicion is increasingly prevalent that it does it badly or simply should not be doing it at all.

And yet the current troubles of the EU were far from unforeseen. Dissenting voices have long existed, and not only in the margins of the academy or the fringes of Eurosceptic political parties. In the decade of self-doubt that followed the Maastricht Treaty, there was a growing concern for Europe's social, political, and democratic deficits and a growing sense of its impending legitimacy crisis.[21] These were signposted at the national level most notoriously in the Maastricht decision of the *Bundesverfassungsgericht,* and the ensuing debate amongst constitutional lawyers and political theorists about its judgment on the legitimacy of the European construct.

Those who supported the basic project of European integration but had concerns about its dominant economic logic articulated legitimacy problems of a quite specific type,

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[17] *See generally* DAVID MARQUAND, THE END OF THE WEST: THE ONCE AND FUTURE EUROPE (2012).

[18] Etienne Balibar, *Europe: Final Crisis? Some Theses*, 13 THEORY & EVENT (2010), *available at* https://muse.jhu.edu/journals/theory_and_event/v013/13.2.balibar.html.

[19] Joseph Weiler, *Editorial: 60 Years since the First European Community – Reflections on Political Messianism*, 22 EUR. J. INT'L L. 303, 303 (2011).

[20] Joseph Weiler, *Editorial: Integration Through Fear*, 23 EUR. J. INT'L L. 1, 1 (2012).

[21] *See* Grainne de Burca, *The Quest for Legitimacy in the European Union*, 59 MOD. L. REV. 349, 349 (1994) (discussing the general issue of the EU's legitimacy post-Maastricht); Joseph Weiler, *Fin-De-Siècle: Do the New Clothes Have an Emperor?*, *in* THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?' AND OTHER ESSAYS ON EUROPEAN INTEGRATION, 238, 238-40 (1998) (describing a "crisis of ideals" that the Europe of Maastricht suffered from); *see also* Carol Harlow, *Citizen Access to Political Power in the European Union* (European University Institute, Refugee Studies Centre Working Paper No. 99/2, 1999); Christian Joerges, *What is Left of the European Economic Constitution?* (European University Institute, Working Paper Law No. 2004/13, 2004) (discussing specifically the social deficit). On the general democratic deficit of the Union, see Simon Hix & Andreas Follesdal, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravscik,* 44 J. COMMON MARKET STUD. 533 (2006).

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bemoaning the market-driven ethos of the EU and its lack of political market-correcting capacity. This lament has been a refrain for at least the last twenty years, accelerating after Maastricht and finding its most powerful and concise articulation in the work of Fritz Scharpf.[22] And outside of the academy, French Prime Minster, Lionel Jospin, provided this stark warning in a speech from 2001:

> Till recently the efforts of the Union were concentrated on the creation of monetary and economic union . . . But today we need a broader perspective if Europe is not to decay into a mere market, sodden by globalization. For Europe is much more than a market. It stands for a model of society that has grown historically.[23]

The project of European integration was, of course, born out of crises that might appear to dwarf our own; this is not unusual for the modern polity, which quintessentially emerges from the ashes of revolution. But appearances might be deceptive. And despite the fact that crisis seems almost to be a natural state of affairs in the relatively short lifespan of the European polity, there is a sense that "this time is different," that something qualitatively distinct is presently occurring, even if there is little precision as to what exactly justifies such a critical prognosis.

This uncertainty reflects the notorious difficulty in categorizing the EU—and its predecessor communities—due to its asymmetric compound structure and its contested teleology. It has been described as an unidentified political object, as *sui generic*, neither "fish nor fowl," and, in a spirit of intellectual resignation, simply as an "impossible object."[24] A sense of trajectory is crucial in depicting the EU because it is in a process of apparently incessant change; if the constitution, in any context, is "not a segment of being but a process of becoming,"[25] this process is unfolding at a particularly rapid pace at the supranational level.

If Europe is undergoing a constitutional metamorphosis, this will not be revealed by an analysis of positive laws, constitutional texts and institutional arrangements alone—which is not to say that these are unimportant. Indeed, it is highly significant that much of the response to the crisis has taken place outside of the constitutional architecture of the Union or at least in an ambiguous gray area between the "Community Method" and the

[22] *See e.g.*, FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 62 (1999).

[23] Habermas, *supra* note 10, at 9 (noting "[i]n his magnificent speech of May 28, the French Prime Minister [Lionel Jospin] spoke of this 'European way of life' as the content of a political project").

[24] Anderson, *supra* note 11, at ix.

[25] MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 113 (2003).

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pure intergovernmentalism of international agreement.[26] The EU is in critical danger of becoming an *unconstitutional* union.

Supposing that "what doesn't kill it makes it stronger," the questions are where the EU's strength will be concentrated in the future, what kind of political and legal power it will yield, and what kind of public is imagined by it. If Europe now faces not merely a "constitutional moment" but a genuine constitutional crisis, on the proper—ancient—understanding of the constitution as reflecting the health and strength of the body politic, what kind of transformation of political form is signaled by its impending reconstitution?

C. The End of Democracy?

According to Jan-Werner Müller, Europe has reached a genuine conjuncture, breaching a democratic threshold by developing a *qualitatively* different relationship with its national sovereign states and therefore transforming itself *politically*.[27] For Müller, this transformation has a dual aspect: It is characterized both by the EU's increasingly intense, even if informal, intervention in the domestic life of its member states—most evident, and ominous, in the case of Greece—and by its less documented but perhaps equally disarming non-intervention or impotence—most notably in the case of Hungary.[28] The identification of this double crisis as signaling a qualitative change in political form is particularly significant in the light of Müller's broader thesis that the containment of democratic majorities, following a deeper distrust of popular sovereignty, is by no means a recent project or one pertaining specifically to the EU, but traceable to the beginnings of the post-war period.

Signaling dissatisfaction with well-worn technocratic and administrative apologies for European integration, Müller's narrative paints a distinct if essentially far from unorthodox picture: The distrust of popular—and even parliamentary—sovereignty exemplified by, if

[26] *See* Edoardo Chiti, Agustin Jose Menendez & Pedro Gustavo Teixeira, *The European Rescue of the European Union*, *in* THE EUROPEAN RESCUE OF THE EUROPEAN UNION?: THE EXISTENTIAL CRISIS OF THE EUROPEAN POLITICAL PROJECT 395 (Reconstituting Democracy in Europe Report No. 19, ARENA Report No. 3/12, Edoardo Chiti, Agustin Jose Menendez & Pedro Gustavo Teixeira eds., 2012)(leading to the coining of a new method of governance, the *Union Method*).

[27] *See* Jan Werner-Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 39, 44 (2012):

> Countries like Greece are now effectively forced to renegotiate their basic social contracts. Such interference, without any overarching supranational architecture to generate legitimacy, is both quantitatively and, I would argue, qualitatively new: it goes beyond what might have been covered under the old post- war European understanding of constrained democracies.

[28] Infringement proceedings against Hungary have been launched on the grounds concerning the independence of its central bank, its judiciary, and the date protection authority.

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by no means unique to, the make-up of the EU was borne of a fear of backsliding into the authoritarianism that devastated Europe in the first part of the twentieth century.[29] The EU's non-democratic constitutional make-up was designed by elites to lock-in or at least to safeguard the democratic form of the nation-state through political, legal, and economic means, creating a supranationally protected or militant democracy, with Europe acting as a guardian of the economic stability and political authority of its members.[30] At both European and national level, the delegation of administrative and executive powers to administrative agencies and the newly constructed—and powerful—"constitutional" courts prevented states from sliding into political extremism and committing democratic suicide. And, looking beyond its own, contingent, borders, the EU offered prospective members the prize of such guarantees for the future, from those in Southern Europe emerging from dictatorships in the 1970s to those in central and Eastern Europe emerging from the dissolution of the Soviet Union in the 1990s. Accession to the EU appealed to these regimes because it offered political sanctuary, a safe forum for transition to and consolidation of liberal values and democratic institutions.

The EU, on this reading, was never itself meant to be democratic. It was instead designed to preserve the national form of liberal democracy, to "conserve the great democratic achievements of the European nation-sate," as Habermas put it, or to "rescue" the nation-state, as in Alan Milward's famous story of origins.[31] This was a goal that could only, or at least better, be achieved collectively: The relative autonomy of one state could be made compatible with the relative autonomy of each by agreeing to a mutual, voluntary discipline. Problems of governance could be better solved in common, and transnational effects internalized through the creation of supranational institutions—and, as it turned out, strong judicial guarantees of legality and enforcement, centralized as well as decentralized.[32] There were of course inevitable difficulties that beset the project of

[29] Müller, *supra* note 27, at 39-47 (identifying the factors salient to the post-war European choice for a "highly restrictive understanding" of democracy as the Cold War, the experience of Nazism, the influence of theories of totalitarianism and, not least, the domination of Christian Democracy in Western Europe at the time, making the late 1940s and 1950s the "Christian Democratic moment.").

[30] The idea of militant democracy was coined by the German jurist Karl Loewenstein. *See*, *e.g.*, Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638 (1937). Although it clearly has a German heritage, its basic sentiment is more widespread, amongst liberals as well as conservatives. In the UK, for example, beginning in the late 1970s there were powerful and diverse political and constitutional movements against so-called tyranny of the majority, which initially attempted to justify restraints placed on democratic majoritarianism and later to moderate the tradition of parliamentary sovereignty by advocating a written constitution. The term *elective dictatorship*, or similar, itself has a long history from Jefferson's concern to reject "elective despotism," to Lord Hailsham's polemic against "elective dictatorship." *See* THE FEDERALIST NO. 48, at 157 (James Madison) (Seven Treasures Publications ed., 2008) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (1781)); LORD HAILSHAM, THE DILEMMA OF DEMOCRACY: DIAGNOSIS AND PRESCRIPTION ch. 20 (1978).

[31] Habermas, *supra* note 10, at 6; ALAN MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE 4 (2nd ed. 2000).

[32] This rationale was given theoretical treatment by Christian Joerges, who illustrated it with an expansion of the motto "no taxation without representation." *See* Christian Joerges, *Taking the Law Seriously: On Political Science*

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integration, particularly after Maastricht's attempt at widening and deepening of the Union. But by the time the Central and Eastern European countries emerged as candidates for accession, the EU had developed so far beyond its original remit that the joke was that Brussels would replace Moscow as the political master of the newly acceded states. This was not entirely ironic, as the Polish Constitutional Court underlined in its defiance of the supranational spirit in its infamous accession decision.[33]

Peace and prosperity were of course the trumpeted twin ideals of European integration, and they were linked by an Enlightenment tradition with a strong pedigree: Fraternity through commerce, the triumphant culmination of Benjamin Constant's project of modern liberty. Added to this were the structural as well as ethical ideals of supranationalism: Taming national sovereignty through a transnational rule of law that encouraged and, to some extent, enforced an ethos of constitutional tolerance.[34] From this perspective the EU was not *un*-democratic but rather *a*-democratic. To assess the EU using the same democratic measure as the nation-state was to make a category error; it failed to be sensitive to the deep problems of translation that bedeviled any attempt to transplant constitutional principles from national to supranational level.

What emerged in Europe, from a constitutional perspective, was a mixed regime, or a mixed commonwealth, combining elements of aristocracy, democracy, and technocracy, but whose central rationale was the safeguarding of nation-state democracy. Supranational institutions were fashioned which were functionally equivalent to those in traditional liberal regimes—such as executive bodies, legislative chambers and constitutional courts—but because of its *sui genericity*, liberal arguments about the separation of powers and limited government had to be imaginatively rethought and novel methods of legal interpretation and enforcement devised. Ideally Europe would represent a kind of "militant democracy writ large," one that not only safeguarded the democracy of its members, but also respected their constitutional identities.

But if the project of European integration was designed essentially to lock-in or support national democracy, this central thread has begun conspicuously to unravel. Member States, both small and large, north and south, core and periphery—or at least powerful constituents within them—are beginning to question whether their ideals and interests are

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and the Role of Law in the Process of European Integration, 2 EUROPEAN LAW JOURNAL 105, 117 (1996). For a critique of this theoretical contruction, see Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement*, 16 EUR. L.J. 315 (2010); Alexander Somek, *The Argument from Transnational Effects II: Establishing Transnational Democracy*, 16 EUR. L.J. 375 (2010).

[33] *Trybunał Konstytucyjny* [Polish Constitutional Court], Case No. K 18/04, May 11, 2005, OTK Z.U. 2005/6A (Pol.) (determining Polish membership of the European Union and the validity of the Accession Treaty).

[34] The idea of 'constitutional tolerance' in the EU belongs of course to Joseph Weiler. *See*, *e.g.*, J.H.H. Weiler, *In Defense of the Status Quo: Europe's Sonderweg*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 18 (J.H.H. Weiler & Marlene Wind eds., 2003).

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better served without the constraints imposed by the EU. More significantly still, social movements across Europe are turning against the EU and its established institutions, just as they are turning towards their transnational counterparts.[35] The threat to liberal democracy is increasingly seen to come from the EU itself; it is considered part of the problem rather than part of the solution in terms of guaranteeing the stability and vibrancy of democratic regimes. And there are good reasons for this evaluative reversal. As Müller argues both in relation to intervention in Greece, and non-intervention—or ineffective intervention—in Hungary, the legitimacy of the EU is becoming increasingly suspect from a democratic point of view, even, or especially, for those who are otherwise disposed to support the basic project of European integration.[36]

With the militant democratic rationalization of the EU wearing increasingly thin, Müller's own conclusion is stark: Either we will see a return to nation-state sovereignty within a loose confederation akin to a free trade area, or there will be full economic governance with something approaching a European democracy based on the federal model. Muddling through (*durchwursteln*) is no longer a desirable course to steer or sensible path to follow; it "could actually lead to the destruction of Europeans' greatest political innovation since the democratic welfare state."[37] Now that an impasse has been reached, democracy must either retrench itself at the national level or emerge fully-fledged at the European level. National retrenchment is unlikely because of the threat this would pose to the single currency, on which so much political, as well as economic, capital depends. A fully-fledged federal Union, however, is also unlikely because of the difficulty in ensuring a democratic EU that is also effective, at least from a German perspective.[38] For historical-ideological reasons, its own deep distrust of democracy, as well as pragmatic concerns—the economic benefits reaped from the post-war liberal consensus and Germany's *Wirtschaftswunder*—Germany, Müller suspects, simply might not be willing to risk a more democratic Union.[39]

The coherence of militant democracy as an idea is questionable, let alone its applicability to a supranational union of ever increasing density and complexity. But more significantly, it is doubtful, to say the least, that safeguarding a vibrant democracy was uppermost in the political designs of the postwar European elites. Müller hints at this with the claim that the

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[35] *See* Mary Kaldor, Sabine Selchow, Sean Deel & Tamsin Murray-Leach, *The Bubbling up of Subterranean Politics in Europe* (London School of Economics, Civil Society and Human Security Research Unit, 2012), *available at* www.subterraneanpolitics.eu.

[36] Müller, *supra* note 27, at 44-5.

[37] *Id*. at 47.

[38] *Id*.

[39] On the former, charting the reaction to the concept of constituent power in German constitutional thought in the twentieth century, see Christoph Möllers, *We are (afraid) of the People: Constituent Power in German Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 87 (Loughlin & Walker eds., 2009).

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polity-building projects of these elites were inspired more by a fear of popular sovereignty rather than any desire for it to be unleashed, in whichever direction. In any case, and his own title suggests that, whether original virtue or original sin of European integration, we are now moving "beyond" the constitutionalist ethos of militant democracy.[40]

But there is an aspect of the narrative of European integration that is missing from Müller's account, albeit glimpsed in the disjunction between democratic and effective governance. Democracy has, in modernity, consistently come up against the imperatives of efficient market capitalism, and the current crisis presents no exception to this dialectical struggle. Turning from constitutional theory to economic sociology and critical political economy, Wolfgang Streeck has recently advanced a particularly cogent account of the current crisis of *democratic capitalism*, as both a general global crisis, which affects all the democratic states of the capitalist world, and a particular and immediate European predicament.[41] Streeck's account provides a powerful explanation of why democracy is coming under such sustained attack in current conditions and why in the European Union there is a particularly acute imbalance between markets and peoples.

D. Crises of Democratic Capitalism

The crisis of democratic capitalism emerges from the deep-seated tension, or dynamic disequilibrium, between the imperatives of capital, which subject politics to the pressures of the financial markets, and those of democracy, which subject politics, ideally, to the demands of the people. This endemic conflict runs deep; it infects social and ethical aspects of our individual and collective autonomy. Streeck points, for example, to the existence of a genuine incommensurability in democratic capitalism between two different principles of resource allocation: One operating according to marginal productivity, and merit by a free play of market forces and the other based on social need, and "certified by the collective choices of democratic politics."[42] This reflects a deeper tension in their respective ethical demands. If the market reflects a marginal ethics, by advancing the prospect and expectation of rational egoism and competitive accumulation, democratic society reflects a maximal ethics, by holding out the prospect of and need for solidarity, collaboration and concern for human well-being.[43] The paradox, and what prevents disequilibrium from turning into outright collapse, is that the market ethos of a capitalist

[40] *See* Müller, *supra* note 27, at 44.

[41] *See Streeck*, *Markets and Peoples*, *supra* note 5, at 63; *see generally* Streeck, *The Crises of Democratic Capitalism*, *supra* note 5.

[42] Streeck, *The Crises of Democratic Capitalism*, *supra* note 5, at 7.

[43] *See* Wolfgang Streeck, *Taking Capitalism Seriously: Towards an Intuitionalist Approach to Contemporary Political Economy*, 9 SOCIO-ECON. REV. 137 (2011).

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political economy is, for systemic survival, parasitic upon the moral restraints imposed by social and democratic norms.[44]

There is of course nothing new in the perception that democracy poses a threat to the interests of capital and that its economic and political goals must therefore be curtailed by the ruling class: "Inside and outside England, from Macaulay to Mises, from Spencer to Sumner, there was not a militant liberal who did not express his conviction that popular democracy was a danger to capitalism," wrote Karl Polanyi in *The Great Transformation*.[45] And Polanyi claims too that this conviction acquires constitutional dimensions, noting that in England, the 'unwritten law of the constitution' had been that "the working class must be denied the vote,"[46] and in the US, the written constitution by separating the economic sphere and protecting private property had created "the only legally grounded market society in the world."[47]

Streeck is far from alone in this analysis. Jürgen Habermas, adopting a longer historical viewpoint, and introducing a conceptual spin on the crisis thesis, notes that the tension between democracy and capitalism that is now being played out globally is no mere historical contingency; it is based on an antagonism that goes to the heart of their relationship. Not merely functionally different but also conflicting in their operating rationalities, capitalism and democracy are deontologically at odds with each other:

> Since the beginning of the modern era, the market and politics have had to be repeatedly balanced off against each other in order to preserve the network of relations of solidarity among the members of political communities. There always remains a tension between capitalism and democracy because the market and politics rest on conflicting principles.[48]

[44] *Id.; but see id*. at 156 (noting, "only in a functionalist worldview" is the success of efforts at taming capitalist excesses actually "guaranteed").

[45] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 234 (2001).

[46] *Id.* The same conviction—democracy's potential threat to capital—explains the continuing attempts by the City of London to retain effective constitutional independence in the UK. *See generally*, MAURICE GLASMAN, THE LABOUR TRADITION AND THE POLITICS OF PARADOX: THE OXFORD LONDON SEMINARS 2010-2011 (Maurice Glasman, Jonathan Rutherford, Marc Stears & Stuart White eds., 2011).

[47] *See* POLANYI, *supra* note 45, at 234. The flipside to this antagonism between populism and capitalism would be the growing sense amongst some of the Left in the early twentieth century that democracy—in the absence of a proletarian majority—would not in practice produce a socialist economy, that political equality would not lead to economic "equality," and therefore communist groups must resort to force rather than relying on the ballot box in order to achieve their aims. According to Kelsen's historical analysis, this results in a tension between democracy and socialism. *See* Hans Kelsen, *On the Essence and Value of Democracy*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS, 105-6 (Arthur Jacobson & Bernard Schlink eds., 2000).

[48] JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE 110 (2012).

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Crisis theory itself is often associated with Marxian evaluations of classical capitalism, with crisis the result of an internal tension based on the tendency of the general rate of profit to fall.[49] As the models of classical capitalism—based on notions of unfettered competition—are replaced with those of late, or organized, capitalism—based on government intervention in market mechanisms, toleration of oligopolistic markets and the generation and sustenance of large public sectors—crisis assumes a more complex form, as the economy is increasingly and explicitly entangled with the institutions of political democracy and the state bureaucratic apparatus.[50] This is why, in Habermas's early understanding, even if economic crises could be permanently averted by the modern state, through administrative interference with the economy, legitimation crises persist.[51] Crisis is, in other words, displaced or transferred upwards from the economic to the political system, and from the system to the life-world.

As crises mature from classical to organized capitalism, and then to the neo-liberal "disorganized capitalism" launched in the 1970s and continuing to this day, the basic *political* problem endures: The justification of the private appropriation of public wealth. With a reduction in social mobility, the rigidity of the class structure becomes more prominent, highlighting the issue of "how to distribute the social product inequitably and yet legitimately."[52] To put the point starkly, the general problem faced by the modern state—which is both democratic and capitalist—can be summarized with the following, short question: How to legitimize *inequality*?[53] The predicament raised by the current crisis of the EU, although differing in detail, presents no exception.

Until recently, this has been a problem faced only within nation-states, and resolved, however precariously, by the sense, in whatever manner forged and sustained, of belonging to a community of fate, which binds rulers and ruled and softens, if not eradicates, class conflict. This sense is periodically revived, however insincerely, with

[49] There is some ambiguity about the ultimate fate of capitalist crises in Marxism. In Heinrich's reading of "Capital," although Marx "attempted to prove that crises result from the capitalist mode of production itself and that a crisis-free capitalism is impossible," there is no "comprehensive theory of crisis." MICHAEL HEINRICH, AN INTRODUCTION TO THE THREE VOLUMES OF KARL MARX'S CAPITAL 171 (Alexander Locascio trans., 2012). Heinrich notes that for the capitalist system crisis can be quite "productive," at least in the short to medium-term. *Id*. at 121. Whether economic crises would ultimately lead to the *collapse* of capitalism or even whether political crisis would *necessarily* follow from economic crisis is far from certain, in his analysis. *Id.* at 178.

[50] *See generally* JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., 1976).

[51] *Id.*at 40.

[52] *See* MCCARTHY, *supra* note 4, at 166.

[53] William Connolly, who asks this question in the US context, identifies two "fundamental sets of priorities" that conflict: Greater productivity—the (dis)illusion of the American dream of increasing and universal private affluence and social mobility—and constitutional democracy. *See* WILLIAM CONNOLLY, POLITICS AND AMBIGUITY 76 (1987).

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communitarian mottos such as that currently in vogue, "We are all in it together." From a functional perspective, resources of solidarity might be considered a necessary complement to a market economy, in order for the ruled to be willing to accept or at least acquiesce in the inequalities that it permits if not creates. But this sense of being part of a collective endeavor, necessary for any non-trivial redistribution of benefits and burdens, or toleration of non-trivial levels of socio-economic inequality, is precisely what is considered so elusive in the EU and beyond the state more generally.

In the European Union, the dynamic disequilibrium of democratic capitalism is pushed to tipping point due to the structural asymmetries imposed by Europe's peculiar brand of federalism. [54] The centralization of financial politics and decentralization of social-democratic politics tips the balance overwhelmingly in favor of capital and against democracy. Idiosyncratic features of supranational integration not only combine to prevent cogent political-democratic response to the social disfunctionality of the market but also deter the creation of possibilities for such response: A central bank unable to buy government debt and bound to the single objective of ensuring price stability, the relative lack of labor mobility due to cultural and linguistic heterogeneity, unprecedented wage repression in the largest economic bloc, an eclectic mix of economic development and bureaucracies in different phases of modernization, and above all the—real or perceived—absence of a community of fate.[55] Instead, *market discipline* was supposed to perform the function of stabilizing the economic system, to compensate for the merely soft, symbolic sanctions against fiscal excesses in the Stability and Growth Pact and for the "no bail-out" rule enshrined in the Treaty that prevented, in theory, transnational sharing of the burdens of any crisis.[56]

These defects in the EU's political and legal constitution are exacerbated by the signals sent from the strongest constitutional court in the region, delivering judgments from

[54] It is Fritz Scharpf, above all, who has conceptualized and described in institutional detail the social and economic imbalances caused by Europe's constitutional asymmetry. *See*, Fritz Scharpf, *The Asymmetry of European Integration: or Why Europe Can't Have a Social Market Economy*, 8 SOCIO-ECONOMIC REV. 211 (2010).

[55] As Perry Anderson puts it:

> In the European simulacrum of federalism, there could be no 'transfer union' along American lines. Once crisis struck, cohesion in the Eurozone could only come, not from social expenditure, but political dictation—the enforcement by Germany, at the head of a bloc of smaller northern states, of draconian austerity programmes, unthinkable for its own citizens, on the southern periphery, no longer able to recover competitivity by devaluation.

Perry Anderson, *After the Event*, 73 NEW LEFT REV. 49, 56-57 (2012).

[56] Consolidated Version of The Treaty on the Functioning of the European Union art. 125, Mar. 30, 2010, 2010 O.J. (C 83) 171; *see* Chiti et al., *supra* note 26; *but see Pringle v. Ireland*, CJEU Case C-370/12, 2012 E.C.R. I-000, *available at* http://curia.europa.eu/juris/recherche.jsf?language=en. .

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Karlsruhe which reverberate throughout the Union and its supranational and national institutions. As early as the Maastricht decision, Jürgen Habermas noted that Dieter Grimm's argument against a European constitution, echoing the Karlsruhe's judgment in urging a retreat to the shelter of the nation-state, would have the effect of eroding precisely that which was deemed integral to the state's *raison d'etre*: The ability to protect the welfare of its citizens.[57] The recent Lisbon Treaty decision, moreover, whilst rhetorically safeguarding the social state in Germany, shows scant concern for the effect of its decisions on social democracy elsewhere in Europe.[58]

Commenting on recent events in Europe, Streeck notes that the dialectic of democracy and capitalism has been unfolding "at a breathtaking speed," with the replacement of Greek and Italian governments 'by highly regarded economist-technocrats… [to] finally enforce the logic of the markets.''[59] But it is precisely as a result of this logic that the EU is now turning, by default rather than by consensual design, into a "redistributive state."[60] As a result, cracks have begun to appear not only in the economic but also in the social system—in the "lifeworld"—with the "consensual foundations of social interaction" and "the identity of the persons caught up in the fateful process" threatened.[61] Public problems of social integration and collective identity, although most evident at the periphery, are widespread throughout Europe.[62]

If Streeck's background dilemma functions as a leitmotif for *constitutional* change, as a device for conceptualizing the dynamics of integration, what does this suggest about the reformation of Europe? It suggests a different narrative to Müller's stark dichotomy of national retrenchment/European political union, one which is less palatable, but not for that reason less likely. Müller hints at it by implying that Germany wants to maintain the Euro but avoid European democracy: to have its cake, a supranational economy, and eat it too, by maintaining the semblance of national political sovereignty.[63]

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[57] *See* Jurgen Habermas, *Does Europe Need a Constitution? A Response to Dieter Grimm*, *in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 155 (Ciarin Cronin & Pablo de De Greiff eds., 1998).

[58] The role of the German court is complex and ambiguous and cannot be fully explored here. But, as Scharpf puts it, "the [Lisbon] decision appears fundamentally flawed because the court has failed to consider its generalised implications in the light of the Kantian categorical imperative." See Scharpf, *supra* note 54, at 242.

[59] *See* Streeck, *Markets and Peoples*, *supra* note 5, at 64.

[60] *See generally* Damian Chalmers, *The Redistributive State*, 18 EUROPEAN L.J. 667 (2012).

[61] *See* McCarthy, *supra* note 4, at 159.

[62] *See*, *e.g.*, Kaldor, *supra* note 35.

[63] *See* Müller, *supra* note 27, at 45-46.

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In this alternative, the order to be sustained through the building of strong state-like institutions functioning as supranational guarantees is less the formal democratic order of the modern Westphalian nation-state than the substantive liberal order of the transnational market economy. In this narrative, democracy is sacrificed at the altar of economic unity and financial stability. This, at least, is the shadow cast by the specter of authoritarian liberalism.

E. Lineages of Authoritarian Liberalism

Authoritarian liberalism portends a limited rather than a militant democracy.[64] Although sharing a certain militancy in its protection of order, market liberalism rather than democracy is selected as the order to be zealously promoted, and even, if necessary to be protected *from* democracy. Properly speaking it would be labeled "authoritarian market liberalism," or, if a motto were permitted, "[S]trong state, free economy."[65]

Authoritarian liberalism is outlined here only in stylized form in order to provide some background to its emergence as a transnational phenomenon. Its key characteristic is to curtail or to conceal the conflict between democracy and capitalism rather than to confront it head on through building strong political institutions or reconcile it by supporting social projects. Instead, conflict is managed—successfully or unsuccessfully—from above, in an elite-led attempt to maintain economic stability in the absence of any collective unity or social solidarity. The methods utilized to maintain stability might be formal or informal, coercive or consensual but constitutional principles and legal norms—written and unwritten—are set aside, ignored or distorted in order to maintain the economic credibility of the polity and assuage the pressure exerted by the financial markets. Underlying this constitutional mutation is the attempted depoliticization of the polity, based on a re-conceptualisation of constitutionalism where the economic becomes foundational of the political.

The authoritarian liberal distrust of democracy is based not on a concern for the rights of religious, ethnic or cultural minorities, or the values considered essential for the democratic process, such as freedom of expression or of assembly, but on the perceived need to contain public interference with private market freedoms and immunities, such as

[64] Authoritarian liberalism was coined just a few years before Loewenstein's *militant democracy*, and by another German jurist, Herman Heller. Herman Heller, *Autoritarer Liberalismus?,* 44 DIE NEUE RUNDSCHAU 289 (1933). More recently it has been used by Sisira Jayasuriya to describe the emergent state form in East and Southeast Asia under the pressures of economic globalization especially after the Asian crash of the late 1990s. *See* Sisira Jayasuriya, *Authoritarian Liberalism, Governance and the Emergence of the Regulatory State in Post-Crisis East Asia*, *in* POLITICS AND MARKETS IN THE WAKE OF THE ASIAN CRISIS 315, 318-19 (Richard Robison, Mark Beeson, Kanishka Jayasuriya & Hyuk-Rae Kim eds., 2000).

[65] Christian Joerges has explored this theme in the context of the *Sozialstaats* controversy in the new Federal Republic of Germany as well as the European Union; *see* Christian Joerges, *Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 9 COMP. SOC. 65 (2010).

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the right to accumulate wealth, to contract and dismiss freely, to dispose of one's property and to exploit, wherever possible, the privatization of public assets. It is concerned with creating as great an area of economic freedom as possible through promoting the values of unbridled competition and private entrepreneurship. This encapsulates the ideology of the *market state*, the twenty-first century political form that is destined, in one influential account, to replace the twentieth century paradigm of the nation-state.[66]

But it is in fact an old idea, wearing new clothes. The notion that the free economy requires a strong, authoritarian, state in order to ensure its fully efficient functioning has a long lineage, even if it has recently resurfaced in spectacular fashion as a result of the pressures of economic globalization.[67] It is the bread and butter of the school of ordo-liberalism—from which authoritarian liberalism as described here descends—but it is defended in some variation by a range of thinkers from Carl Schmitt to Friedrich Hayek.[68] Closely related to what is commonly now referred to as neo-liberalism, ordo-liberalism is, one might say, simply more honest and straightforward about the role of the strong state in guaranteeing the "free economy," which is hardly free and ensuring "the rules of the game," which are bent when necessary.[69]

Authoritarianism and market liberalism are more closely affiliated than might be casually suspected. Hayek's support of Pinochet's brand of authoritarian liberalism in South America is well documented.[70] This was not merely a case of justifying strong emergency

[66] *See* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY 213-243 (2002).

[67] The translation of Foucault's lectures given in 1979 has also recently brought to the English-speaking world the significance of ordo-liberalism and its authoritarian qualities. *See* MICHEL FOUCAULT, THE BIRTH OF BIO-POLITICS: LECTURES AT THE COLLEGE DE FRANCE (Michel Senellart ed., Graham Burchell trans., 2010).

[68] *See* RENATO CRISTI, CARL SCHMITT AND AUTHORITARIAN LIBERALISM (1998) (employing the concept of authoritarian liberalism to bridge the distance between Schmitt and Hayek). Carl Schmitt's address to a conference of the *Langnamverein* translated by Cristi as "Sound Economy in a Strong State" held in Dusseldorf on 23 Nov. 1932, forcefully defends "autonomous economic management"—as opposed to "economic democracy"—as a sphere in between state and individual. *Id*. at Appendix. On the similarities and differences between Schmitt and Hayek, see William E. Scheuerman, *The Unholy Alliance of Carl Schmitt and Friedrich Hayek*, 4 CONSTELLATIONS 172 (1997). Scheuerman concludes that there is an "elective affinity" between "free market economics and authoritarian politics" that has become "common in the contemporary political universe." *Id*. at 184.

[69] The term *neo-liberalism* was coined at the Walter Lippman colloquium in 1938 by one of the key protagonists of the ordo-liberal tradition, Alexander Rustow, in order to distinguish their project from laissez-faire liberalism. For discussion, see Werner Bonefeld, *Adam Smith and Ordo-Liberalism: On the Political Form of Market Liberty*, 39 REV. INT'L STUD. 233, 234 (2012). Carl-Joachim Friedrich, in an early comment, uses the term neo-liberal to describe the ordo school, and suggests that it has strong "elitist" tendencies. *See* Carl J. Friedrich, *The Political Thought of Neo-Liberalism*, 49 AM. POL. SCI. REV. 509 (1955). The purpose here is not to engage in systematic analysis of ordo or neo-liberalism but rather to expose a common "authoritarian" theme. The question whether the similarities between ordo- and neo-liberalism are more significant than the differences will be bracketed here.

[70] For a recent examination, attempting to separate Hayekian fact from fiction on this score, see Andrew Farrant, Edward McPhail & Sebastian Berger, *Preventing the Abuses of Democracy: Hayek, the Military Usurper and Transitional Dictatorship in Chile*, 71 AM. J. ECON. & SOC 513 (2012).

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powers temporarily in response to an external threat to peace and security, such as those posed by terrorism or a belligerent sovereign power, but of accepting the stewardship of a benign dictator to prevent the "road to serfdom" that the pursuit of social justice leads down. As Hayek puts it: "Laissez faire is a highly ambiguous and misleading description of the principles on which a liberal policy is based."[71] The neo-liberal state does not reject coercion and planning, it is, he says, a planner too, it is a planner "for competition."[72] Market freedoms, in other words, require the market police—including the full coercive and ideological power of the state apparatus—for their protection and maintenance.

For the ordo-liberal, classical liberalism's *laissez-faire* approach erred in its attempt to isolate the economy from society and from the interventions of political government.[73] But although favoring a strong state in order to prop up the free market, ordo-liberalism does not necessarily favor a strong democracy. The ordo-liberal textbook, as Habermas puts it, "has more confidence in the economic constitution than in democracy."[74] It favors arrangements that are "credible" from the perspective of financial institutions, i.e. functionally geared towards achieving "sound money" rather than subject to the messiness of political interference that characterizes modern democracy. Ordo-liberalism, the predominant political ideology in Post-war Germany, places more faith in the technocratic-elitist machinery of the economic constitution to control the market—and guide the citizen-consumer—than the volatile machinations of political democracy to do so. Faced with the basic dilemma of the modern state outlined by Streeck—the perpetual tension between democracy and capitalism—the ordo-liberal or authoritarian liberal sides with the latter.

The archetypal citizen—if that is not a misnomer—of the incipient market state finds individuality in consumption and lifestyle choices rather than authentic or political expression.[75] Authoritarian liberalism, like its militant democratic cousin, is, arguably, generated by concern for minorities, even if these are the 1% and the concern is for their unfettered accumulation of wealth. Restricting economic interference with private choices, even if those choices are excessive by conventional standards, is considered justified in order to prevent a kind of total political —even if democratic—control over the whole of the economy and of society.

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[71] FRIEDRICH HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS THE DEFINITIVE EDITION 118 (Bruce Caldwell ed., 2007).

[72] *Id.* at 90.

[73] Ordo-liberals mistakenly associate the *laissez-faire* view with the classical liberalism of Adam Smith. *See* Bonefeld, *supra* note 69, at 236.

[74] *See* Habermas, *supra* note 48, at 129.

[75] For an exploration of the new type of citizenship opened up by the EU, see Richard Bellamy, *The Liberty of the Moderns: Market and Civic Freedom Within the EU*, 1 GLOBAL CONSTITUTIONALISM 141 (2012).

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It is not only in a strictly legal sense that authoritarian liberalism pursues its agenda, it is an ethical-moral and political movement as much as one of positive law reform. In fact, as noted earlier, one of its characteristics is a willing to sacrifice principles of legality in the face of perceived economic necessity. It stands for the creation of a "moral economy, by which is meant a society that accepts the pursuit of economic freedom as a matter of personal responsibility."[76] Market freedom, from this perspective, does not follow a purely economic logic, because it "requires the incorporation of the moral sentiments of enterprise into a lifestyle . . . It is a practice of government."[77] Authoritarian liberalism prioritizes, with force if necessary, the imperatives of the capitalist system over the political demands of the people and the functional demands of social interaction. It promotes spatial expansion of markets, increased commodification and more generally the modernization of the economy, denigrating background traditions, conventional norms, ethics, and any sense of the common good.[78] It is linked with a "normatively diminished conception of the person," a purely "rational decider," who is deprived not only of any moral concern for the interests of all, but also of any republican concern for collective self-legislation in a community of equals.[79]

And yet in the absence of such concerns, and without the prospect of socio-economic equality, as Herman Heller presciently warned in 1928, at an earlier peak of socio-economic inequality that is being approached today, "the most radical formal equality becomes the most radical inequality, and formal democracy becomes the dictatorship of the ruling class."[80] Despite the temporary tranquility, he noted, social homogeneity—the necessary goal of democracy—"is lacking to an extent unmatched in previous eras."[81] The economic superiority of a certain sector of the population will turn political democracy into tyranny, because of the influence that sector will be able to exert on the political process through control of public opinion, media, education and so on. For Heller, social homogeneity—the sense in which real, material, equality might be considered a genuine possibility within the parameters of the constitutional system—is necessary to democracy precisely to avoid the disillusionment of the working class and the consequent allure of authoritarianism.[82]

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[76] *See* Bonefeld, *supra* note 69, at 245-6.

[77] *Id.* at 238 (discussing Müller-Armack).

[78] This process is captured by Rosa Luxemburg's characterization of the invasion of social life by market capitalism as land-grabbing or *Landnahme*. *See* Rosa Luxemburg, THE ACCUMULATION OF CAPITAL 328 (Agnes Schwarzschild trans., 2003).

[79] *See* JÜRGEN HABERMAS, POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 94 (Max Pensky ed., trans., 2002).

[80] Hermann Heller, *Political Democracy and Social Homogeneity*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS 256, 262 (Arthur Jacobson & Bernard Schlink eds., 2000).

[81] *Id*.

[82] *Id.* at 260.

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The specter of authoritarian liberalism facing Europe is thus far from historically unprecedented. As depicted here, it has a strong structural affinity to what Alexander Somek has termed "authoritarian constitutionalism." As he describes it:

> Authoritarian constitutionalism accepts structures of governance that contain most of the features of constitutional democracy with the noteworthy exception of (parliamentary) democracy itself. Thus, the type of constitutional law to which authoritarian doctrine favourably responds may well include the rule of law, the protection of basic rights and traces of the separation of powers, but nonetheless excludes the election of, and control by popular assemblies. Agreement with such a system of governance is not the only defining characteristic of authoritarian constitutionalism. It is distinctive in that it defends the absence of democracy by pointing to a goal—the goal of social integration—that it assumes can only be achieved by authoritarian government and that its attainment would be seriously undermined if co-operation were sought with Parliament or civil society. The lack of democratic representation and of democratic accountability is accepted for the sake of a project of social integration or social reconstruction.[83]

Somek is describing constitutionalism in Austria in the interwar period, specifically the period from 1934 to 1938; but could a more apposite account of the current project of European integration be concocted? Admittedly the project or goal is first and foremost economic rather than social integration, although for the neo-functionalist fathers of integration, at least, the one was supposed to follow the other. But in the distinction of positing a goal that is sacrosanct, an end that justifies the means—including those which sacrifice democratic accountability through pervasive strategies or accidents of depoliticization—the structural similarities are startling and should provide a salutary warning.

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[83] Alexander Somek, *Austrian Constitutional Doctrine 1933 to 1938*, *in* DARKER LEGACIES OF LAW IN EUROPE 361, 362 (Christian Joerges & Navraj Singh-Ghaleigh eds., 2003). Martin Loughlin notes that the process of constitutionalization beyond the state, as a "freestanding process of rationalist constitutional design," one that can operate without the fiction of authorization by "the people," "threatens to transform itself into a new phenomenon, which can be called "authoritarian constitutionalism," through which a new "'imperial network' . . . will seek to secure the legitimacy of its global rule." Martin Loughlin, *In Defence of Staatslehre*, 48 DER STAAT 1, 26 (2010).

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F. Authoritarian Liberalism and the European Union

What is, then, the relationship between the political and the economic order in the reconceptualization of constitutional political economy at the supranational level? From an authoritarian liberal perspective, the purpose of the EU is quite straightforward: To ensure capitalist economic freedoms against democratic majoritarian interference, to expand as far as possible the competitive marketplace for entrepreneurs to exploit and to maintain economic stability. As candidly noted by one of its more prominent advocates, "the legitimacy of the present system," based as it is on "guarantees of economic freedom," is "quite independent from the EU's democratic and socio-political future."[84]

Do reactions to the current crisis suggest that the EU's constitutional trajectory is staunchly conditioned if not determined by the perceived need to safeguard a strong or "sound" economy rather than promote a vibrant democracy?[85] Is the primary concern of the EU, in other words, that Member States might jeopardize the neo-liberal economic project rather than backslide into a form of political authoritarianism?

The extraordinary reactions of elites in Brussels, Berlin and elsewhere to the perceived threat posed by the prospective election of Syriza in Greece, for example, certainly suggest so.[86] As indeed does the ease with which a technocratic government was bestowed upon Italy in order to calm the financial markets, although domestic circumstances help to explain the relative lack of protest at the installation of an economist-technocrat in Rome. The authoritarian liberal faith is concretized in the conditions imposed by the *Troika*—European Commission, IMF, and ECB—and now formalized and, partially, constitutionalized, by the insistence on budgetary controls over national parliaments contained in the Fiscal Compact.[87]

[84] Ernst-Joachim Mestmäcker, *European Touchstones of Dominion and Law*, 58 ORDO Y.B. ECON. & SOC. ORD. 3, 5 (2007).

[85] Whether this conditioning is a result of external pressures or political choices, unintended consequences or design, is complex and will be tentatively examined below. Constitutional reactions to the far Left in the guise of militant democracy in Germany with the banning of the communist party suggest a longer legacy to authoritarian liberalism's fear for the survival of the market economy. Müller notes that the "equation of Soviet Communism and Nazism" implicit in the new "disciplined democracy" (Loewenstein) was in danger of relativizing the evils of the latter. *See* JAN WERNER-MÜLLER, CONTESTING DEMOCRACY: POLITICAL IDEAS IN TWENTIETH-CENTURY EUROPE 147 (2011).

[86] *See, e.g.*, Frank Schirrmacher, *Democracy Has Junk Status*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 2, 2011, http://www.presseurop.eu/en/content/article/1128541-democracy-has-junk-status (describing the earlier horrified reaction to Papandreou's promise of a referendum to the Greek people: "[T]he moral conventions of the postwar period are being wiped out in the name of a supposedly higher financial and economic rationale.").

[87] Although formally outside the EU legal framework the Fiscal Compact is, like the prior Euro Plus Pact, substantially within it. On this legal ambiguity see, Chiti et al., *supra* note 26, at 400-1.

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When European elites discuss the need for a stronger political Union, they project a polity that is able to discipline and coerce in order to ensure the conditions of a free and flourishing transnational economy and, if necessary, to achieve this through means which conflict the wishes of the democratic majority, either across Europe or within its various Member States. Coercion and discipline are not legitimate substitutes for solidarity, but they might be effective ones, at least in the short term. It is therefore no surprise to see the weakening of Parliamentary bodies, national as well as supranational—with the exception of the Bundestag—and an increasingly executive dominated Europe, with the enhancement not only of supranational executive branches, the Commission and the European Council, but also of national ones, in particular the Franco-German axis, or least one half of it.[88]

Increased executive power obtains its legitimacy not from any strong popular backing, but primarily from the economic credibility it claims to generate. It is a functional, market-liberal, rather than a democratic logic that is driving the process of integration, seemingly inexorably forward. And it is a logic that, if necessary, and with apparent impunity, disregards principles associated with the transnational rule of law, in particular the community method—the principle of the equality of members states and the principle of European unity.[89] Reforms of the EU are shrouded by a twilight zone of constitutional ambiguity that serves the functions of "executive emergency constitutionalism."[90]

Etienne Balibar identifies in the current crisis the potential for if not already the actuality of a "revolution from above," a transformation of Europe "which the leaders of dominant nations and the Brussels and Frankfurt technostructure are attempting under the whip of necessity,"[91] a variant of Weiler's "integration through fear," with reforms being pushed through using the threat of the predicted collapse of the single currency. If the Euro fails, Europe fails, we are told.[92] This notion of revolution from above, invented by Bismarck, designates, Balibar continues:

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[88] *See* Jan Werner-Müller, *What do Germans Think About When They Think About Europe*, 34 LONDON REV. BOOKS 18, 19 (2012) (noting that Romano Prodi recently said, "Germany is Europe's paymaster. Even Franco-German summits are now really 'German- German summits' "). A recent editorial conveys the message, apparently without irony, that "[w]e are all speaking German now." LB & JHR, *The Fiscal Compact and the European Constitutions: We are Speaking German Now*, 8 EUR. CON. L. REV. 1 (2012).

[89] *See* Chiti et al., *supra* note 26, at 421.

[90] *See* Chiti et al., *supra* note 26, at 417. According to them, " 'the in and out' from the constitutional framework operates as a precondition for the rise of executive emergency constitutionalism, as it tends to minimize public debate and to avoid the ordinary filters of the democratic constitutional state" *Id*.

[91] Étienne Balibar, *Europe's Revolution from Above*, THE GUARDIAN, Nov. 23, 2011, http://www.guardian.co.uk/commentisfree/2011/nov/23/europe-revolution-from-above.

[92] CGH, *'If the Euro Fails, Europe Fails': Merkel Says EU Must Be Bound Closer Together*, DER SPIEGEL, Sept. 7, 2011, http://www.spiegel.de/international/germany/if-the-euro-fails-europe-fails-merkel-says-eu-must-be-bound-closer-together-a-784953.html.

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> [A] change to the structure of the material constitution, in which the balance of power between society and state, economics and politics, results in a preventive strategy on the part of the ruling classes. Is this not what is happening with the neutralization of parliamentary democracy, the European Union's institutionalization of budgetary and fiscal controls and the sacralisation of banking interests in the name of neo-liberal orthodoxy? Doubtless these changes have been germinating for quite some time, but they have never been demanded as part of a new configuration of political power.[93]

In this new configuration of power, the constitutionalist ethos in Europe is being transformed into a militant market liberal ethos, with government in thrall to the global capital markets and the other accouterments of neo-liberalism, such as cheap and flexible labor, privatization and "sound money". The monetary project of the Euro is sacrosanct; European integration lives or dies by it. In this new paradigm, constraints—*Sachzwänge*, as Streeck refers to them—on democratic self-determination are not, in the first place at least, 'constitutional' in the orthodox sense of the term but are relayed by the credit rating agencies, which, along with banks that are considered "too big to fail," become constitutional actors "for all material purposes."[94] Although, due to institutional paralysis at the EU level, crisis initially prompted renationalization of financial markets, the constraints are now, in the current phase, to be formally constitutionalized at the EU level through the provisions of the Fiscal Compact and the European Stability Mechanism, at least for the EMU countries.[95]

This is by no means a straightforward ideological and constitutional coup: In Germany, as with the EU itself, the force of a neo-liberal ideology is and must be, constitutionally speaking, moderated if not curtailed by promises to maintain a democratic and social state or sustain a degree of social solidarity. The EU is founded on democratic as well as liberal values, including citizenship and, now, explicitly in the Treaty, on representative

[93] *Id*. The notion of a "revolution from above" is advanced by Sheldon Wolin as characteristic of the totalizing shifts in political and economic power generated by elites in postmodern democracy and its hybrid of the corporatist state. *See* SHELDON WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 605 (2004).

[94] *See* Chiti et al., *supra* note 26, at 395.

[95] For more detail on the various phases of response to the crisis, see *Id.* at 404-416. *See also*, Agustin Menendez, *The Existential Crisis of the European Union* (in this issue).

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democracy.[96] It is worthwhile to remember that the post-Lisbon EU is obliged to "combat social exclusion and discrimination," promote "social justice and equality" and promote "economic, social and territorial cohesion and solidarity among Member States."[97] It also promises to "respect the equality of Member States as well as their national identities," to respect "their essential state functions" and "ensure the territorial integrity of the state."[98] These provisions are not without consequences, political as well as legal.[99] The evolution towards authoritarian liberalism is not the only narrative of European integration available.

And yet, these precepts of political constitutionalism are occluded by focusing predominantly, as in one influential recent report, on growth, sound finances, monetary stability and economic competitiveness, with the state of EMU trumping any concern for the fate of the European polity. [100] The Future of Europe Report pays lip service to the importance of citizens' engagement and to the creation of a "European political space" but its goals are fairly transparent: Strengthening the Economic and Monetary Union has "absolute priority," we are told.[101] *Absolute* priority? Outweighing in all cases concern for peace and harmony, freedom and equality, democracy, justice or solidarity? Does the functioning of EMU override the protection of minority rights? These do not even emerge as a secondary concern, which is increasing the Union's political clout on the world stage, including by means of creating a European army. In external relations the focus is on making decisions more strategic, streamlined, efficient and effective, creating a "single market for armaments," and strengthening external borders.[102] Sustainable energy policy is appended as just "another field" where we might want "more Europe."[103] Institutionally, the European Commission should be strengthened, but the European Parliament only rendered it less invisible—and in concrete steps, "informing" and "consulting" it rather than placing it center stage in the decision-making process.

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[96] Consolidated Version of the Treaty on European Union art. 10, Mar. 30, 2010, 2010 O.J. (C 83) 15 [hereinafter TEU].

[97] *Id*. art. 3.

[98] *Id*. art. 4(2).

[99] This has been evident in the line of decisions on the ECJ on citizenship. For an overview, see Ferdinand Wollenschläger, *A New Fundamental Freedom Beyond Market Integration*, 17 EUR. L. J. 1 (2011).

[100] FINAL REPORT OF THE FUTURE OF EUROPE GROUP OF THE FOREIGN MINISTERS OF AUSTRIA, BELGIUM, DENMARK, FRANCE, ITALY, GERMANY, LUXEMBOURG, THE NETHERLANDS, POLAND, PORTUGAL AND SPAIN, Sept. 17, 2012, *available at* http://www.auswaertiges-amt.de/cae/servlet/contentblob/626338/publicationFile/171838/120918-Abschlussbericht-Zukunftsgruppe.pdf.

[101] *Id.* at 1.

[102] The "external" dimension of authoritarian liberalism, no less significant than its internal dimension, cannot be explored here.

[103] *See* FINAL REPORT OF THE FUTURE OF EUROPE GROUP, *supra* note 100, at 7.

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The Future of Europe Report highlights the sovereign debt crisis, but barely mentions the banking crisis that preceded it or the economic, political and ideological climate of neo-liberalism that nurtured its roots.[104] And it is silent on the institutional and elite corruption in the periphery, or elsewhere, and how to tackle it. Changing treaty reform from unanimity to super-qualified majority is not given any political justification, such as facilitating the articulation of a principle of European integration or a common good for Europe. In its priorities, the report neatly reflects the authoritarian liberal's willingness to dispense with any concern for the democratic health of the polity, to disregard, in other words, the vitality of its political constitution.

G. Depoliticization and European Integration

Materialization of the specter of authoritarian liberalism is surely not inevitable. But it is armed with a particularly powerful ideological motto, one that has been voiced in the EU, in various registers and with varying degrees of conviction, in the wake of the recent financial, economic and political crises and which is most commonly associated with the earlier ruthless pursuit of the neo-liberal project: "There is no alternative" (TINA).[105] The purpose of this final part is to explore this refrain as a special instance of a more general trend towards depoliticization and its effects on the constitutional trajectory of Europe.

Depoliticization in the EU is only a symptom of a larger crisis of ideology that follows 'the end of history', even if a particularly acute example. Because of the dominance of the neo-liberal economic model—and its attempted, and to a large extent successful, cooption of other domains, disciplines and fields of enquiry—certain issues are simply removed from the table of democratic contestation. The question of how far, for example, to socialize the economy is largely excluded from the realm of our democratic collective choices, even if imposed wholesale, in an executive manner, in order to rescue financial institutions deemed essential to the capitalist economy. The characterization of the current market liberalism in the EU as authoritarian is strongly confirmed by the language typically used in its support: "[T]here is no alternative" to monetary union.[106] The Euro cannot fail, we are told; the consequences would be too grim for all concerned and would signal the end of the EU itself.[107] What we are now offered by the political Messianism of European elites is

[104] On the neo-liberal roots of the present crisis, see DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISIS OF CAPITALISM 10 (2010).

[105] It was a slogan famously associated with Margaret Thatcher in the 1980s. See, e.g., Michael Krämer, *There is No Alternative!*, THE GUARDIAN, May 4, 2013, http://www.guardian.co.uk/science/life-and-physics/2013/may/04/no-alternative-bayes-penalties-philosophy-thatcher-merkel.

[106] *See* Weiler, *supra* note 19.

[107] *See, e.g.*, CGH, *supra* note 92.

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not integration through law, let alone integration through concrete achievements of actual solidarity, but integration through *necessity*.[108]

The point about such eschatological sentiment is that if there is truly "no alternative," then why bother going through the motions of political democracy at all? Beyond the instrumental utility for those in power of even a sham constitution attaining a certain level of unreflective popular support in order to increase compliance, democratic politics becomes superfluous in these circumstances. Necessity tranquilizes politics in an atmosphere where decision has become more important than judgment.[109]

Instead of encouraging the building of a strong democracy, authoritarian liberalism is content with a weak, deracinated public, one that can be better managed and controlled by the technocratic and political elites at national and supranational level. The emergence of what might be termed a novel form of supranational *Machtstaat* favors, in other words, no more than a partial democracy, and is content with a limited one, in which any transnational elements of political democracy, or solidarity beyond the market are tamed, if not erased. Publics, to the extent they survive the onslaught of austerity measures, are pitted against each other rather than against the ruling elites. Core is pitted against periphery, nation against nation; it is, as certain political leaders now urge in the climate of economic austerity, sink or swim.[110] Authoritarian liberalism ensures the transit from the "European rescue of the nation-state" to the "European rescue of the Washington consensus," as one recent commentator puts it.[111]

To be sure, "[i]n the absence of credible alternatives, there is a certain rationality in holding on to illusions with which we are already familiar."[112] But a sense of inevitability,

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[108] Through steps of concrete achievements building on de facto solidarity is of course how integration was envisaged to proceed in the Schuman Declaration. *See generally* Robert Schuman, *Schuman Declaration*, May 9, 1950, *available at* http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm.

[109] According to Hannah Arendt, politics is characterized by freedom and the non-political—the "social" in modern times—by necessity, "where technical mastery rather than speech and deliberation fittingly hold sway." *See* Keith Breen, *Law Beyond Command? An Evaluation of Arendt's understanding of Law*, *in* HANNAH ARENDT AND THE LAW 15, 25 (MacCorkindale & Goldoni eds., 2012).

[110] David Cameron's Conservative Party Conference Speech: In Full, DAILY TEL., Oct. 10, 2012, http://www.telegraph.co.uk/news/politics/conservative/9598534/David-Camerons-Conservative-Party-Conference-speech-in-full.html (delivering a speech on October 9, 2012 to the Tory Party conference).

[111] Susanne Lütz & Matthias Kranke, *The European Rescue of the Washington Consensus? EU and IMF Lending to Central and Eastern European Countries* (London School of Economics, 'Europe in Question' Discussion Paper Series No. 22, 2010). That paper discusses the harshness of EU conditions compared to the IMF in the case of CEE countries. But the initial bilateral loans applied to Greece were subject to harsh conditions and harsher rates of interest than applied by the IMF.

[112] *See* CONNOLLY, *supra* note 53, at 82.

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which appears as an instance of impotence, determines our situation, critically, as one characterized by *heteronomy*, rather than autonomy. Crisis, in the language of the young Habermas, signified precisely this element of heteronomous objectivity, analogous to a pathological framework that is independent from the subjective consciousness of a patient, who, implicated in a sense of a powerless to revert the cause, is "doomed to passivity,"[113] much like the European citizen, for whom crisis deprives "a part of his normal sovereignty."[114] The subject of this pathological condition will regain freedom only by "smashing the mythical power of fate."[115] The mature Habermas succumbs precisely to the force of the sense of predetermination in current conditions: "Since 1989," he suggests, "it has become impossible to break out of the universe of capitalism; the only remaining option is to civilize and tame the capitalist dynamic from within."[116]

The perception of the initial movement of capitalism and market-making in quasi-naturalistic terms, as an unstoppable social and evolutionary force, which politics can do nothing more than attempt to tame or civilize in response can be traced back through to Weber's rationalization thesis of modernity via a systems theoretic functional differentiation of social spheres.[117] But what remains of the political foundations of the modern state and the supranational project once the liberal economic system has attained such autonomy and apparent invulnerability to constitutional change? What of the autonomy of the political in circumstances where the economic has attained such a dominant constitutional position?

The practical obstacles to repoliticization of a transnational and multi-level polity as complex as the EU are clear enough. The EU, on one powerful reading, was built as an anti-political polity from the outset.[118] And from a position of authoritarian liberalism, the political deficit is in fact essential to the *stability* of an integration process based first and foremost on economic rationality and functional process. The authoritarian answer to the question, "how to legitimize inequality?" is the depoliticization of the public realm.[119] This

[113] *See* JURGEN HABERMAS, JURGEN HABERMAS ON SOCIETY AND ETHICS: A READER 266 (Steven Seidman ed., 1989).

[114] *Id.*

[115] *Id.*

[116] *See* HABERMAS, *supra* note 48, at 106. Habermas notes that the transformation of law and politics in the process of European integration is bound up with capitalist dynamics of "functionally driven opening" of integration-inclusion followed by a "socially integrative closure." *See* HABERMAS, *supra* note 48, at 113.

[117] Gunther Teubner provides a contemporary articulation of this Weberian thesis in the context of Europeanization and globalization.

[118] For an exploration of this theme, see Neil Walker, *The Anti-Political Polity*, 73 MOD. L. REV. 141 (2010).

[119] *See* McCarthy, *supra* note 4, at 160 (noting, "the class relationship is institutionalized through the labour market and therefore 'depoliticised' "); *see also* McCarthy, *supra* note 6, at 166 (arguing "the public realm, whose functions have been reduced largely to periodic plebiscites in which acclamation can be granted or withheld, is structurally depoliticized.").

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demands "widespread civil and familial-occupational privatism," an ethos of competition—the "achievement motive"—and an ideology that suggests the "naturalness" of the existing social order and the inequalities it results in.[120] Depoliticization of the public sphere finds support in elite theories of democracy and technocracy, which, with the classical doctrine of political economy, appeals precisely to the "natural" quality of the prevailing organization of society.[121]

Along with the tight conceptual and institutional link between the economic and the juridical in the new market economy order, depoliticization is key to understanding the project of ordo-liberalism and its offshoot of authoritarian liberalism.[122] Ordo-liberalism, as Foucault noted, inverts the relationship between the political and the economic, so that economic constitutionalism, becomes a new freestanding foundation for the polity, albeit one which requires strong structures of governance to maintain its autonomy.[123] We have already seen how legitimacy, from an ordo-liberal perspective, is quite independent of democracy and society.[124] On this reading, and it is a plausible one, the EU was deliberated constructed with a political and democratic deficit, a deficit that one can now understand has dramatic implications for attaining an equilibrium between democracy on the one hand and capitalism and the financial markets on the other. The disequilibrium that ensues can then apparently only be re-equilibrated by the actions of authoritarian government, and the cycle continues, with the subsequent democratic reaction of "the people", who feel disenfranchised against the prevailing authoritarian political structures.

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[120] McCarthy, *supra* note 4, at 166. The supposed naturalness of the economic order advanced in forms of ordo and neo-liberalism is also picked up on by Foucault. *See* FOUCAULT, *supra* note 67, at 15, 21.

[121] *See* McCarthy, *supra* note 4, at 167.

[122] Mestmäcker is worth quoting in full:

> The mutual opening of legal and economic studies to one another made possible the insight into their joint significance for market economy order. Contrary to other social sciences and to law, economics had no difficulties to progress from the wealth of the nation to the wealth of nations. But, like a shadow, private law follows the transactions from which markets and competition emerge without consideration for national borders. Despite methodical difficulties that have yet to be overcome to this day economics and law are closely linked to one another. The hinge is formed by the firm discipline imposed by the shortage of economic resources and the political symbiosis of the public interest in democracies with the economic prosperity of their populations

See Mestmäcker, *supra* note 84, at 5-6.

[123] *See* FOUCAULT, *supra* note 67, at 295. I examine the notion of freestanding constitutionalism in more depth in Wilkinson, *supra* note 3, at 200. Foucault was not the first to notice ordo-liberalism's neglect of the concept of popular sovereignty. *See* Friedrich, *supra* note 69.

[124] Mestmäcker, *supra* note 84.

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In Europe, the *no demos thesis*, a shibboleth of European integration studies, performs the function of legitimizing depoliticization or at least contributing to the sense that "there is no alternative" to economic liberalism.[125] For authoritarian liberalism, the absence of collective democratic identity thus represents a solution rather than a problem: We are reduced to mere individuals, or consumers, remade in the image of the marketplace. An economic constitution not only can do without a demos, it positively benefits from its absence, because, without social solidarity—the we-feeling amongst the members of the polity that is supposedly absent beyond the state—the demand for redistribution is unlikely to be articulated from the bottom-up.[126] Likewise, any collective challenge to established political authority, formal or informal, struggles to get off the ground. With one market and one currency, but with several peoples and— it must be added—several different types of political economy and varieties of capitalism, the demand for redistribution across borders is organizationally problematic and highly unlikely as a political program, but not only for the reasons that might be assumed on the basis of the no demos thesis. The reason, as Streeck notes, is that the new alignment "translates class conflicts into international conflicts, pitting against each other nations that are each subject to the same financial market pressures for public austerity." [127] In the process,

[125] The authority for what came to be known as the "no demos thesis" was none other than Herman Heller. The disingenuity of the German Court's reference to Heller was noted by Weiler in his response to its judgment. *See* Joseph Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastricht Decision*, 1 EUR. L.J. 219 (1995). For Heller, contrary to the German Court's reading in its Maastricht decision, *homogeneity* is a predominantly social and economic category rather than a spiritual, cultural, or ethnic one. What is decisive for the question of homogeneity is not the intellectual or ideological superstructure but the reality of economic disparities. He recognizes, nevertheless, that the bourgeoisie as a class will attempt to resurrect ideologies, including those of nationalism and of monarchy, in order to maintain its own position of power amid the eternal "cycle of elites." *See* Heller, *supra* note 80, at 261.

[126] Hayek's vision of interstate federalism was "expressly designed to safeguard the free workings of the market *from* democracy, against whose dangers he was always on his guard, proffering to envisage a 'demarchy' dispensing with the fetish of universal suffrage." *See* Anderson, *supra* note 11, at 104. For further discussion, see Alexander Somek, *The Social Question in a Transnational Context* (London School of Economics, Europe in Question Discussion Papers Series No. 39/2011, 2011), *available at* http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper39.pdf.

[127] Streeck, *The Crises of Democratic Capitalism*, *supra* note 5, at 28 n. 21:

> [P]olitical appeals for redistributive 'solidarity' are now directed at entire nations asked by international organizations to support other entire nations, such as Slovenia being urged to help Ireland, Greece and Portugal. This hides the fact that those being supported by this sort of 'international solidarity' are not the people in the streets but the banks, domestic and foreign, that would other - wise have to accept losses, or lower profits. It also neglects differences in national income. While Germans are on average richer than Greeks, although some Greeks are much richer than almost all Germans, Slovenians are on average much poorer than the Irish, who have statistically a higher per capita income than nearly all Euro countries, including Germany.

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"ordinary people" are expected to demand "sacrifices" from other ordinary people of other States, "rather than from those who have long resumed collecting their 'bonuses.' „[128]

But what remains of the no demos thesis in the wake of sovereign debt restructuring that involves redistribution on a scale that would dwarf the support provided by the Marshall Plan after 1947?[129] Is pointing to the fact that much of the bailout money is ultimately destined to return to German or French banks enough to sustain its coherence as a plan of ultimately *domestic* redistribution of wealth, even if from poor to rich?

H. Conclusion: The Specter of a Democratic European Consciousness?

In the absence of a strong sense of collective identity and of any effective political mechanisms for resolving class conflicts supranationally, but with the perceived need for supranational management of economic and political problems, the specter of authoritarian governance beckons. Laissez-faire is no response to riots and protests, as those in Athens and Madrid, and elsewhere, have discovered to their cost. The increasing use of coercion, on the streets, and condescension, only partially concealed in the horse-trading behind the scenes, is indicative of a crisis of political democracy, with the European polity finding it increasingly difficult to maintain the stability necessary to assure the financial markets but seemingly unable to relinquish or even reconsider the project of monetary union. This is a peculiar brand of authoritarianism, not because it is driven by a neo-liberal economic ethos, which it shares with many domestic arrangements, but because its authority structure is fragmented and dispersed by virtue of the multi-level and polycentric nature of the European construction.[130] But the legislative and executive power increasingly utilized to implement the policies considered necessary to assuage the

[128] Streeck, *The Crises of Democratic Capitalism*, *supra* note 5, at 28 n. 21.

[129] Although as Featherstone notes, the comparison has to be handled with care due to very different economic circumstances. *See* Kevin Featherstone, *Le Choc de la Nouvelle? Maastricht, Deja-Vu and EMU Reform* (London School of Economics, Europe in Question Discussion Papers Series No. 52/2012, 2012) *available at* http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper52.pdf.

[130] As Perry Anderson notes:

> All but universally, the prescriptions applied to restore the faith of financial markets in the reliability of local intendancies include cuts in social spending, deregulation of markets, privatizations of public property: the standard neo-liberal repertoire, assorted with increased tax pressures. To lock these in, Berlin and Paris are currently resolved to force the requirement of a balanced budget into the constitution of all seventeen nations of the Eurozone—a notion long regarded in America as a shibboleth of the crackpot right.

Anderson, *supra* note 55, at 57.

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financial markets, and the coercive power increasingly used to discipline populations whose reflective allegiance to the state can no longer, it seems, be taken for granted, combine to suggest a constitutional mutation of the European polity which affects both supranational and national government and the relationship between them.

To be sure, this specter is far from an exclusively EU, or even European apparition, as the various organized coercive and occasionally brutal responses to the Occupy, and other anti-capitalist social movements across the world demonstrate.[131] And the general *problematique*, the political dilemma, affects all the democratic states of the capitalist world, who now have "not one sovereign, but two: [T]heir people, below, and the international 'markets' above."[132] But European integration exposes the core tension between democracy and capitalism in a specific manner. The effort given to expanding and intensifying markets and the market ethos, through various forms of commodification, comes up against other social and political forces not only internally—strong labor unions, codes and conventions of ethical behavior, political and social movements, and that might be tamed by the democratic mode of legitimation through periodic elections—but also externally. The very principle of democratic self-determination of the Member States of the Union is threatened and within a polity that is supposed to protect and enhance the constitutional identity and democratic equality of its members.

Is there an alternative?

A specter of different type might have haunted Brussels's Europe: one where the disempowerment of the nation-states would come 'to depend upon the "European consciousness" of its peoples—or even upon the mobilization of a democratic European consciousness.[133]

But if the prospect of European-wide popular empowerment was real, it was rapidly and radically curtailed. Rather than democratic mobilization, neo-functionalism resumed on its path, headier in its pursuit of further and deeper integration than ever before. If the specter of a democratic European consciousness was haunting Europe, it was exorcised in double-quick fashion by the high priests of the new liberal order in Brussels and elsewhere.

Monetary union, initially conceived as a technocratic exercise—therefore excluding the fundamental questions of national sovereignty and democracy that political union would entail—is now rapidly transforming the EU into a federal entity, in which the sovereignty

[131] On the US movement, see David Graeber, *Occupy and Anarchism's Gift of Democracy*, THE GUARDIAN, Nov. 15, 2011, http://www.guardian.co.uk/commentisfree/cifamerica/2011/nov/15/occupy-anarchism-gift-democracy.

[132] *See* Streeck, *Markets and Peoples*, *supra* note 5, at 64.

[133] *See* Streeck, *Markets and Peoples*, *supra* note 5, at 67.

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and thereby democracy of the nation-states, above all in the Mediterranean, exists 'only on paper'. Integration now spills over from monetary to fiscal policy.[134]

Agency, in this image of the project of integration, is elusive. It is not only functional spill-over, but also the initial movement of capitalist expansion and market-making which is increasingly construed in highly naturalistic terms, akin to an unstoppable social evolutionary force, about which politics can do little more than attempt to tame or civilize in response or reaction.[135] But authoritarian liberalism dispenses even with the process, real or imagined, of democratic rebalancing of capitalist inequalities, leaving it to government to respond as it sees fit, subject only to the whims of the financial markets and the weakened legal and constitutional constraints at EU and national level.

The escape from democratic politics signaled by the practice and discourse of integration through necessity is not new; its sentiment is as old as philosophy itself. Liberalism's attempt to escape from politics through economics, argues Hannah Arendt, is not a departure, but a continuation of the philosophical tradition that begins with Plato and ends with Marx.[136] Authoritarian liberalism as a political phenomenon appeals not to action and possibility, but to stability and necessity. Once a substitute for action is found—which is traditionally the role of the absolute, in modern times Sieyes' nation or Jefferson's self-evident truths—politics becomes mere administrative execution, analogous to the private economic decisions of the household.[137] An essential trait of authoritarian government is to point towards a source of authority beyond the sphere of power, and, like the law of nature or the commands of God, not itself man-made. The source of authority apparently beyond the sphere of power, and therefore beyond the sphere of democratic politics, is now the global capital markets, anonymized in the form of barely comprehensible and virtually unaccountable credit rating agencies. Our disempowerment continues, even if in modified form.

Is there an alternative to the dominant paradigm of market liberalism backed up by relatively coercive authoritarian regimes, an alternative to the subordination of "human purposes to the logic of an impersonal market mechanism"?[138] Is this alternative one

[134] *See* Streeck, *Markets and Peoples*, *supra* note 5, at 67.

[135] For a narrative that now seems to persuade, see generally Habermas, *supra* note 48.

[136] *See* HANNAH ARENDT, BETWEEN PAST AND FUTURE 17-19 (1968); *see also* HANNAH ARENDT, THE HUMAN CONDITION 222 (1958) (making the same strong point). "Escape from the frailty of human affairs into the solidity of quiet and order," Arendt notes, "has in fact so much to recommend it that the greater part of political philosophy since Plato could easily be interpreted as various attempts to find theoretical foundations and practical ways for an escape from politics altogether." ARENDT, THE HUMAN CONDITION, at ch. 5.

[137] This substitution is not in fact distinctively modern, but takes its cue from the Platonic inauguration of the "great tradition." ARENDT, THE HUMAN CONDITION, *supra* note 136, at 110.

[138] Fred Block, *Introduction* to KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME xviii, xxxviii (2001).

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where "ordinary people in nations around the globe engage in a common effort to subordinate the economic to democratic politics and rebuild the global economy on the basis of international co-operation"?[139] Prerequisite to a project of control and direction of the economy to meet our individual and collective needs is a basic reminder of the foundations of the modern constitutional settlement, inaugurated by 'we, the people', and a reminder of the constitutional priority of politics over economics.

And there is a different way of looking at the seemingly inexorable spread of market liberalism through the process of European integration, which places the political—and the state as its major, if contingent form—at the root of the political economy of capitalism, both classical and late.[140] Reconsider this much-quoted passage of Joseph Weiler, with a change of emphasis:

> A "single European market" . . . is not simply a technocratic programme to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a *highly politicised choice of ethos*, ideology and political culture: [T]he culture of "the market" . . . premised on the assumption of formal equality of individuals . . . . Crucially, this not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European-wide neutrality of competition above other competing values.[141]

Politics, in other words, is not merely a mechanism for *reacting* to the disembedding of the economy caused by an unbridled ethos of capitalism and free markets and for *restabilizing* society in response to the human needs neglected by the phenomenon of marketization. Rather than merely playing the role of countermovement, politics may itself be a vehicle for the *first* movement of market creation and market expanding, of taking on the role of

[139] *Id.* at xxxvii.

[140] See, for example, Werner Bonefeld, who identifies an innate connection between the state and the market in neo-liberal capitalism, suggesting the capitalist state is a liberal—but not a weak—state, based strongly on maintaining divisions of class. Werner Bonefeld, *Neo-Liberal Europe and the Transformation of Democracy*, *in* GLOBALISATION AND EUROPEAN INTEGRATION 51 (Nousios, Overbeek & Tsolakis eds., 2011).

[141] Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2477 (1991) (emphasis added). Oddly this powerful claim about the market qua political choice doesn't feature much in his recent scathing assessments of the EU, although there is brief mention the loss of transnational solidarity in an editorial. See JHHW, *Editorial: 60 Years Since the First European Community—Reflections on Political Messianism*, 22 EUR. J. INT'L L. 303, 305 (2011).

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market-maker. States and other political entities, in other words, "create and enforce markets, first inside and then . . . outside their territorial jurisdiction."[142]

Once depoliticization through market integration is conceived and acknowledged as a highly *politicized choice* of ethos, alternatives to authoritarian liberalism might come into view. At the very least, what might emerge is a challenge to its most potent dogma: There is no alternative. Renewing this challenge is a prerequisite to the regeneration of Europe and to its political reconstitution. Only then might the specter of authoritarian liberalism be banished by the specter of a European democratic consciousness and the impossible interregnum that separates national and postnational sovereignty rendered less impossible of being traversed. This would not put an end to the tension between democracy and capitalism but it would at least acknowledge it as based on the political constitution and open to democratic mediation.

[142] *See* Streeck, *supra* note 43, at 161.

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